

BEFORE THE
GOVERNING BOARD OF THE
WHITTIER UNION HIGH SCHOOL DISTRICT
STATE OF CALIFORNIA

In The Matter Of The Accusation Against
AILEEN ACOSTA MATA and Other
Certificated Employees of the Whittier
Union High School District,

OAH No. 2011020280

Respondents.

PROPOSED DECISION

Administrative Law Judge Sophie C. Agopian, Office of Administrative Hearings, State of California, heard this matter on April 28, 2011, at the Whittier Union High School District (District) Administrative Offices in Whittier, California.

Attorneys Eric Bathen and Jordan Meyer represented the District's Assistant Superintendent of Personnel Services, Martin J. Plourde (Plourde).

Attorneys Kent Morizawa and Carlos Perez represented Aileen Acosta Mata and 45 other certificated employees of the District. Heather Stirewalt represented herself in this matter. These 47 certificated employees of the District, collectively, are Respondents in this matter.¹

¹ The 47 Respondents include Aileen Acosta Mata, Gina Alexander, Brooke Allison Bixler, Angela Castellanos, Christine Chavez, Sarah Joy Chop, Angelica De La Rosa, Erin Dominguez, Damaris Flores, Adrian Garcia, Nellie Garcia, Mark Gomez, Michael Gomez, Victor Gomez, Ann Marie Gonzalez, Sarah L. Hatcher, Sarah Jensen, Elena Jorgensen, Roxanna Kharaud, Michael Kim, Lindsey M. Knoff, Franz Kuzay, Megan McGregor, Michelle McLaren, Lucia Medina, Veronica Medina, Eugenia Laura Mora, Matthew D. Murray, Lauren Murty, David M. Orloff, Michelle Ortiz, Francess Padgett, Mary Ann Prutsman, Mark A. Quintero, Joshua Edward Rear, Mark Risse, Kelly Ro, Jennifer Sanchez, Norma L. Sandoval, Nicholas J. Scott, Heather Stirewalt, Eric Paul Summers, Damian Paul Torres, Matthew R. Tremper, Jason Vanduyne, John C. Yessian, Katherine M. Zavetsky.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2011-2012 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2011-2012 school year.²

Testimonial and documentary evidence were received and oral stipulations were made on the record. The matter was submitted for decision on April 28, 2011.

FACTUAL FINDINGS

1. Assistant Superintendent Plourde filed the Accusation in his official capacity.
2. Respondents are certificated employees of the District with either permanent or probationary status.
3. On March 8, 2011, the Board of Trustees of the District (Governing Board) adopted a resolution (resolution) deciding to reduce and/or discontinue the following services at the end of the 2010-2011 school year (after June 30, 2011):

<u>Service</u>	<u>FTE³ Reduction</u>
Art	2
Counseling	5
English	15
German	1
Math	10
Physical Education	3
Science	5
Social Studies	5
Spanish	<u>4</u>
Total	50 FTEs

² Three certificated employees, who were provided timely notice of the proposed layoff, including Robert J. Cammarata, Justin W. Kim, and Freissy Meza, did not appear at the hearing and were not represented by counsel. By reason of their nonappearance, they waived objection to the Accusation against them.

³ Full-time equivalent position.

4. The services identified in Factual Finding 3 are “particular kinds of services” that may be reduced or discontinued within the meaning of Education Code section 44955. The Governing Board’s decision to reduce or discontinue the particular kinds of services by 50 FTEs has made it necessary to decrease the number of permanent employees in the District, which means terminating the services of not more than a corresponding percentage of certificated employees of the District, permanent as well as probationary, at the close of the school year.

5. As a result of the reduction and/or discontinuance of particular kinds of services, the Superintendent, or his designee, was authorized and directed to initiate and pursue procedures necessary to not reemploy the equivalent of 50 full-time certificated positions in accordance with Education Code sections 44955 and 44949.

6. In determining the identity and number of employees to notice regarding their proposed layoff, the District properly identified the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued. The District also considered all then known attrition, i.e. the number of employees who were retiring or resigning at the end of the school year. The District did not consider conditional retirements that have not yet been approved by the Governing Board because they were not “positively assured.” The District asserted that if the conditional retirements are approved, it intends to rescind the accusations against those employees whose jobs may be saved due to the additional attrition.

7. As directed by the Governing Board, Assistant Superintendent Plourde, on behalf of the Superintendent and District, provided proper notice to 50 certificated employees that the District intended to layoff. The District permitted all employees who received a preliminary notice of layoff to participate in the hearing, regardless if they filed a request for a hearing. By stipulation, both parties waived all jurisdictional defects. Therefore, all prehearing jurisdictional requirements were met with respect to the 47 Respondents who appeared in this matter.

8. The District established that the reduction or discontinuation of the particular kinds of services set forth in Factual Finding 3 is necessary due to the District’s projected budget deficit of \$9.7 million for the 2011-2012 school year. Therefore, the reduction in force is related to the welfare of the District and its pupils and is neither arbitrary nor capricious, but rather, a proper exercise of the District’s discretion.

9. On February 8, 2011, prior to its adoption of the resolution set forth in Factual Finding 3, the Governing Board adopted a resolution establishing “tie-breaking” criteria for determining the order of seniority for employees sharing the same first date of paid service in a probationary position. Respondents did not challenge the tie-breaking criteria established by the Governing Board, but, in some cases, challenged the application of the tie-breaking criteria to individual circumstances.

a. Three of the tie-breaking criteria at issue afforded employees varying levels of seniority credit for “extra pay” assignments. The most credit was given to employees who fulfilled the requirements of criterion two, that is they are “currently assigned to positions involving a responsibility factor.” “Responsibility factor” was not defined in the resolution, but the District gave credit under this criterion to employees who, in addition to their regular teaching assignment, served the District in another paid capacity involving a significant degree of responsibility, such as a yearbook advisor, or a Department Chair.

b. Employees who fulfilled the requirements of criterion three were given more seniority credit than those who fulfilled the requirements of criterion four. Criterion three afforded credit to employees “currently assigned to positions involving a stipend/release period as defined in Administrative Regulation 4114 (transfer procedures) who will remain in the positions for the following year.” Criterion four gave credit to employees who are “currently assigned to positions involving a stipend/release period not defined in Administrative Regulation 4114 (transfer procedures) who will remain in the position for the following year.”

c. Administrative Regulation 4114 identified the following positions as “extra pay” assignments: All Varsity Head Coaches and all JV Head Coaches; Annual/Yearbook; AVID Coordinator; AVID Site Demonstration School Coordinator; Band; Choral; Drama; Drill Team; Intervention Specialist; Link Crew Coordinator; Newspaper; Pepster Advisor; Puente Coordinator; Senior Project Coordinator; and Speech.

10. One of the Respondents in this matter, Eugenia Laura Mora, an English teacher, shares a seniority date of August 30, 2006, with 12 other English teachers. Six of the 13 English teachers with the same seniority date, including Ms. Mora, received preliminary layoff notices. Ms. Mora contends that she deserves a tie-breaker credit for the extra duties she performs in connection with the Puente Program, which is a college advisement program for underrepresented students. Ms. Mora testified that she serves as a “club advisor” and oversees all of the extracurricular activities for the program. While Ms. Mora established that she works many extra hours performing these duties, she is not the Puente Coordinator, as set forth in Administrative Regulation 4114, and does not receive compensation or release time from the District for performing such duties. Instead, the compensation she receives comes from the University of California Office of the President. Accordingly, Ms. Mora does not deserve a tie-breaker credit under criteria two, three or four, and remains subject to layoff among those English teachers noticed for layoff.

11. Respondent David Orloff is one of the six English teachers with the seniority date of August 30, 2006, who were noticed for layoff. Mr. Orloff testified that he serves in a stipend position as the “course lead” for various reading classes. His duties consist of conducting assessments, developing curriculum, attending professional development activities, and preparing agendas and meeting minutes. For the 2010-2011 school year, Mr. Orloff received a \$500 stipend from the District to serve in this assignment. However, the course lead position will not continue for the ensuing school year. Accordingly, Mr. Orloff does not deserve a tie-breaker credit under criteria two or three because they require that the person “remain in the [extra pay] position for the following year.”

12. Respondent Elena Jorgensen is a Spanish teacher whose date of seniority, according to the seniority list developed by the District, is August 29, 2007. Ms. Jorgensen contends that the District miscalculated her seniority date because she first started working for the District in a paid probationary position as an intern at the start of the 2006-2007 school year. The District did not dispute that she completed her first year as a probationary teacher during the 2006-2007 school year. The District contends, however, that its calculation of her seniority date is correct because Ms. Jorgensen had a break in service between the 2006-2007 and the 2007-2008 school years. As established by the evidence, Ms. Jorgensen resigned her position from the District at the end of the 2006-2007 school year. Her resignation was approved by the Governing Board on May 8, 2007, and became effective on June 30, 2007. Ms. Jorgensen was notified of the Board's action by a letter dated May 21, 2007. An employment contract signed by Ms. Jorgensen on June 27, 2007, establishes that she was rehired by the District to recommence her employment as a Spanish teacher on August 29, 2007. Between the effective dates of her resignation and her reinstatement under the new contract for the 2007-2008 school year, Ms. Jorgensen had a break in service, which reestablished her seniority date as August 29, 2007, the date determined by the District.

a. Ms. Jorgensen alleges that she only resigned from her employment during her first year as a probationary teacher because sometime between March and May 2007, her principal told her that she would be "laid off" the following year and it would be "in her best interest" to resign in lieu of being "laid off" by the District. Although Ms. Jorgensen could not recall the precise term used by her principal regarding her nonreemployment for the following year, the District established that Ms. Jorgensen, as a first year probationary teacher, was subject to discretionary termination by the District during her first year of probationary service with the District, as long as she was notified of such termination prior to March 15 of her second year of probationary service.

13. The District's actions in this matter, including its development of the seniority list and its application of the tie-breaking criteria to Respondents with the same first date of paid service in a probationary position, meet the requirements of Education Code section 44955, and are neither arbitrary nor capricious.

14. The District established that, by its actions in connection with this reduction in force, no junior employee will be retained to render a service which a more senior employee is certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to Education Code sections 44949 and 44955, by reason of Factual Findings 1 through 7.

2. The services listed in Factual Finding 3 are determined to be particular kinds of services within the meaning of section 44955 and applicable case law, by reason of Factual Finding 4.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in Factual Findings 3, because it relates solely to the welfare of the District's schools and pupils, by reason of Factual Finding 8. Therefore, the Governing Board's decision to reduce or discontinue the identified services was not arbitrary or capricious, but was a proper exercise of its discretion.

4. In implementing the proposed layoff, the District properly identified the certificated employees providing the particular kinds of services that the Governing Board directed to be reduced or discontinued. The District also took appropriate action to ensure that no junior certificated employee is scheduled to be retained to perform services that a more senior employee is certificated and competent to render.

5. By reason of Factual Findings 1 through 14, and Legal Conclusions 1 through 4, cause exists to terminate the services of all 47 Respondents who appeared in this matter, as identified in footnote 1.

6. Cause exists to terminate the services of Eugenia Laura Mora, in part, by reason of Factual Finding 10 because Ms. Mora failed to establish that she deserves additional tie-breaker credit in connection with the duties she performs for the Puente Program.

7. Cause exists to terminate the services of David Orloff, in part, by reason of Factual Finding 11, because Mr. Orloff failed to establish that he deserves additional tie-breaker credit for his present position as a "course lead" for various reading classes because, even if he were retained, he would not serve in that position during the ensuing school year.

8. Cause exists to terminate the services of Elena Jorgensen, in part, by reason of Factual Finding 12, because the District properly identified her seniority date as August 29, 2007.

a. The Education Code generally defines a certificated employee's first date of paid service as date the employee "first rendered paid service in a probationary capacity." (Educ. Code, § 44845.) However, according to Education Code section 44848, if the employee resigns and is subsequently reinstated, the employee's seniority date is the date of reemployment. Education Code section 44848 specifically states:

When any certificated employee shall have resigned or been dismissed for cause and shall thereafter have been reemployed by the board, his date of employment shall be deemed to be the date on which he first accepted reemployment (if reemployed before July 1, 1947) or rendered paid service (if reemployed after June 30, 1947) after his reemployment.

When an employee's services are terminated for lack of enrollment or discontinuance of service or are otherwise interrupted in a manner declared by law not to constitute a break in service, his original order of employment shall stand.

b. Respondent Jorgensen testified that she only resigned her position from the District because she expected to be laid off. While the second paragraph of Education Code section 44848 establishes that, if she were, in fact, laid off from her position and subsequently rehired, her original “order of employment” or seniority date would stand. That, however, is not what occurred with respect to Ms. Jorgensen. Ms. Jorgensen elected to, and did, resign from her position in lieu of undergoing a layoff in order to serve her “best interest” at the time, as advised by her principal. She was not, in fact, laid off due to the discontinuation of a service. Accordingly, the second paragraph of Education Code section 44848 does not apply to Ms. Jorgensen and does not support an earlier seniority date.

c. To the extent that Ms. Jorgensen is contending that the doctrine of equitable estoppel applies to grant her an earlier seniority date, it is not persuasive. Equitable estoppel may be applied against the government “where justice and right require it.” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493.) But it does not apply if it would effectively nullify “a strong rule of policy, adopted for the benefit of the public.” (*Id.*) Furthermore, estoppel cannot be applied to expand a public agency's powers.

In this case, granting Ms. Jorgensen a seniority date prior to her resignation would contravene a school district’s discretionary powers under Education Code section 44929.21 to release a first or second-year probationary teacher without cause. As long as a school district notifies a probationary teacher by March 15 during the second year of probationary service of its decision not to rehire her for the next year, the district may release the employee at its complete discretion, “without any showing of cause, without any statement of reasons, and without any right of appeal or administrative redress.” (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal. 4th 911, 917, quoting *Bellflower Education Assn. v. Bellflower Unified School Dist.* (1991) 228 Cal.App.3d 805, 808; *Hoschler v. Sacramento City Unified School Dist.* (2007) 140 Cal.App.4th 258.) As set forth in Factual Finding 10, the District did not take action to release Ms. Jorgensen prior to the statutory deadline because Ms. Jorgensen’s resignation preempted such action.

The reason for a school district’s broad authority to release first and second-year probationary employees without cause is explained in *Fleice v. Chualar Union Elementary School Dist.* (1988) 206 Cal.App.3d 886. In *Fleice*, the court refused to grant a certificated employee tenure after serving only one year as a probationary teacher although the school district mistakenly informed the employee that she would earn tenure after only one year of probationary service. The court held that equitable estoppel could not be applied to confer tenure upon the employee because she did not fulfill the mandatory two-year probationary period. The court explained that applying estoppel against the school district in this case would effectively nullify the strong public policy of having a two-year trial period for teachers to prove themselves before obtaining tenure and would contravene the limitation on the school board's authority.

It was undisputed that Ms. Jorgensen resigned from her position after serving only one year. Because she had not yet acquired tenure under the Education Code, she could have been released at the end of the 2006-2007 school year without cause. Her testimony that her anticipated nonreemployment was due to a “layoff” is not sufficient to confer any additional rights upon her because no other evidence established that a reduction in force took place that year and that she was, therefore, entitled to the procedural protections of Education Code sections 44949 and 44955.

ORDER

1. The Accusation against the 47 certificated employees identified in footnote 1 are sustained, and the District may notify them that their services will not be needed during the 2011-2012 school year due to the reduction of particular kinds of services.
2. Notice of termination shall be given in inverse order of seniority.

Dated: May 5, 2011

SOPHIE C. AGOPIAN
Administrative Law Judge
Office of Administrative Hearings